

Exhibit A

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**UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
WESTERN DIVISION**

UNITED STATES OF AMERICA,

Plaintiff,

v.

THOMAS VINCENT GIRARDI,

Defendant.

Case No. 2:23-cr-00047-JLS-1
UNDER SEAL DOCUMENT
[UNDER SEAL]

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**DEFENDANT’S MOTION FOR
 ORDER FINDING
 INCOMPETENCY**

[UNDER SEAL]

MOTION

Thomas Vincent Girardi, by Deputy Federal Public Defenders Craig A. Harbaugh, Georgina Wakefield, and J. Alejandro Barrientos, moves for a hearing under 18 U.S.C. §§ 4241(c) and 4247(d) and a finding of incompetency under 18 U.S.C. §4241(d), but without an order of commitment, because Girardi suffers from an irreversible condition and is incapable of being restored.

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MEMORANDUM OF POINTS AND AUTHORITIES

INTRODUCTION

Three neurologists, two neuropsychologists, one neuropsychiatrist, multiple lawyers, and a legion of friends, family, and caregivers all agree: Thomas V. Girardi suffers from dementia and is incompetent to properly assist in his defense.

For several years, Girardi's progressive cognitive decline was evident to those around him. Despite his best efforts to mask and compensate for his impairments, and emphatic denials that anything was wrong, there is overwhelming evidence that Girardi is cognitively impaired and incapable of caring for himself. His ability to learn and retain new information is practically nonexistent. The severe atrophy of Girardi's hippocampi, which is the epicenter of episodic memory,¹ places him in the bottom percentile expected for his age. And his judgment and ability for rational decision making is severely impaired. Girardi's frontal lobes, which manage executive functioning, also show significant volume loss.

The conclusion that Girardi is incompetent to stand trial is supported by reliable and independent sources, including neuropsychological testing data, brain imaging, and countless observations on numerous occasions in a variety of settings by several credible people. After presenting testimony and evidence from experts, other medical professionals, and lay witnesses, the defense will request that the Court issue an order finding Girardi incompetent.

¹ Episodic memory involves the ability to learn, store, and retrieve information about personal experiences that occur in daily life. These memories typically include information about the time and place of an event, as well as detailed information about the event itself. The ability to describe the details of a recent meeting, for example, depends heavily on intact episodic memory function. *See, e.g.,* Bradford Dickerson & Howard Eichenbaum, *The Episodic Memory System: Neurocircuitry and Disorders*. 35 NEUROPSYCHOPHARMACOLOGY 86 (2010)

STATEMENT OF FACTS

I. YEARS PRIOR TO ANY CRIMINAL INVESTIGATIONS, GIRARDI SUFFERED MULTIPLE ACCIDENTS THAT CALLED ATTENTION TO HIS ATROPHYING BRAIN AND COGNITIVE DECLINE.

A. Then-78-year-old Girardi was in a serious car accident that called attention to his atrophying brain and cognitive decline.

While evidence of Girardi's cognitive decline precedes the 2017 automobile accident, brain scans and medical interventions following a 2017 car accident caused doctors to identify existing brain impairment.

Late on the night of July 30, 2017, Girardi lost control of his car and careened down a hillside. When he called his wife early the next morning, he was "confused and did not know where he was." (Ex. 1, p. 1.) He had lost consciousness and was rushed by ambulance to the emergency room at Huntington Hospital in Pasadena, California.

(*Id.*)

Girardi had no memory of the accident. (Ex. 2, p. 1.)

² A CT scan is a diagnostic imaging exam that uses X-ray technology to produce images of the inside of the body.

³ A cerebral infarction occurs as a result of disrupted blood flow to the brain due to problems with the blood vessels that supply it. A lack of adequate blood supply to brain cells deprives them of oxygen and vital nutrients which can cause parts of the brain to die off.

⁴ The ventricles, or chambers within the brain that contain cerebrospinal fluid, are noticeably enlarged. Sulci (plural of sulcus) are the grooves or furrows in the brain which are noticeably widened with volume loss.

⁵ Magnetic resonance imaging is a non-invasive imaging technology that produces three dimensional detailed anatomical images.

1 [REDACTED]
 2 [REDACTED]
 3 [REDACTED]
 4 [REDACTED]
 5 [REDACTED]
 6 [REDACTED]

7 Not only did doctors notice brain impairment, but friends and family also
 8 noticed a decline in Girardi after the accident. Isabella Mancilla, Girardi's then-
 9 housekeeper, noticed changes in Girardi's behavior. In the past, Girardi would
 10 regularly bathe and change his clothing. After the accident, he could no longer
 11 attend to his basic needs. Girardi would frequently wear the same socks for three or
 12 four days. He would bring home used Styrofoam coffee cups home from work for
 13 no apparent reason. (Ex. 41, p. 9)

14 Long-time friend Rick Kraemer similarly noticed that Girardi's "cognitive
 15 acuity began to deteriorate noticeably." (Ex. 5, p.1.) Some of Kraemer's
 16 observations include:

- 17 • Girardi repetitively called people to ask the same question he had
- 18 already asked many times;
- 19 • Girardi had trouble remembering recent places he had been or people
- 20 he had met;

21 //

22 //

23 //

24
 25
 26 ⁶ White matter hyperintensities (WMHs) are brain white matter lesions that are
 27 hyperintense on fluid attenuated inversion recovery (FLAIR) magnetic resonance
 28 imaging (MRI) scans. Larger WMH volumes have been associated with Alzheimer's
 disease and cognitive decline. See Meral A. Tubi et al., *White matter hyperintensities
 and their relationship to cognition: Effects of segmentation algorithm*, 206 J.
 NUEROIMAGE at 1 (2020).

1 Girardi having been married to Jayne for over a decade. (Ex 10, p. 1.) In a similar
2 vein, Girardi would forget which cases he had settled and would ask for updates on
3 closed cases. He would also dictate the same letter or declaration to Cory
4 repeatedly for the same case, having no memory he had just done so. Even when
5 he had “freshly” closed a case, he would almost immediately forget. (*Id.*)

6 Girardi eventually stopped recognizing clients when they called, even when he was
7 previously familiar with the client. Cory and others had to prepare Girardi before
8 he took calls. Girardi would repeatedly ask Cory for the same files, sometimes
9 “minutes” after he had just made the very same request. (*Id.*) He would ask Cory
10 for the phone number for a particular person he knew but then return “a few
11 minutes later,” asking who the person was. (*Id.*) Even after his firm closed, Girardi
12 would call Cory to ask for help with dictations and work. In January 2021, a month
13 after the firm had effectively closed, Girard called Cory on a Friday and said, “I
14 hope you are having a great day off. I will see you on Monday.” (*Id.*)

15 ***Richard Marmaro, Friend & Attorney.*** In March 2020, Richard Marmaro,
16 then-partner at the law firm Skadden Arps, witnessed Girardi during a random
17 encounter at the federal courthouse in a confused state. Marmaro and Girardi were
18 long-time friends and had regularly seen each other at the Stanley Mosk
19 courthouse for the Superior Court of Los Angeles. Marmaro was entering the
20 federal building when a security officer stopped him and asked if he knew Girardi,
21 who was also at the federal building. The officer stated, “The man appears lost.
22 He’s looking for a Department 32.” (Ex. 11) Marmaro greeted Girardi, but Girardi
23 appeared not to recognize him. After Marmaro identified himself, Girardi asked
24 where Department 32 was located. Marmaro, who knew Department 32 referred
25 only to the state courthouse, directed Girardi across the street. (*Id.*) Even though
26 Marmaro knew Girardi had appeared countless times in the state courthouse,

1 Girardi seemed bewildered and still asked if the federal building was “State
2 Court.” (*Id.*)

3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]

8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]

16 ***Isabella Mancilla, Housekeeper/Caregiver.*** In 2021, Isabella Mancilla expanded
17 her role from Girardi’s housekeeper to his daytime caregiver. His inability to function
18 on his own was evident. A year earlier, Girardi could make a small meal or sandwich.
19 But by 2021, he was incapable of even completing that simple task. Girardi could stand
20 and dress himself, but Mancilla had to remind him to do so. Mancilla also kept track of
21 Girardi’s medical appointments because he could not do so. Girardi could previously
22 get around aided by his driver. By 2021, however, Mancilla had to accompany Girardi
23 to ensure he arrived at his appointments and to prevent him from wandering off
24 afterwards. Once, Mancilla transported Girardi for an [REDACTED]. While she was
25 sitting in the waiting room, Girardi left the building through the back exit. Fortunately,
26 Mancilla convinced him to provide his location and not to move until she arrived.

1 When she finally found him about fifteen minutes later, Girardi said that he was
2 walking home.

3 [REDACTED]
4 [REDACTED]
5 [REDACTED]

6 [REDACTED]

7 [REDACTED]

8 [REDACTED]

9 [REDACTED]

10 [REDACTED]

11 [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 [REDACTED]

28 [REDACTED]

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[illegible]

[illegible]

[REDACTED]

**II. GIRARDI WAS PLACED UNDER CONSERVATORSHIP AND
EVENTUALLY IN A LOCKED MEMORY WARD IN AN ASSISTED
LIVING FACILITY.**

**A. On June 9, 2021, a state court judge found by clear and
convincing evidence that then-82-year-old Girardi could not care
for himself or his financial affairs.**

In 2021, due to Girardi's decline, Girardi's brother, Robert Girardi, DDS,
initiated conservator proceedings in probate court. In support of temporary
conservatorship, Dr. Nathan Lavid, a psychiatrist, submitted a declaration attesting to
Girardi's incapacity. (Ex. 20, p. 1.) Dr. Lavid found Girardi could not attend the
conservatorship hearing "for the foreseeable future" because of "dementia [that]

[REDACTED]

1 impairs his ability to understand the proceeding.” (*Id.*) The State Bar of California and
 2 prior co-counsel to Girardi objected. But the probate court found their objections
 3 meritless. Robert Girardi was designated as temporary conservator for Thomas Girardi.

4 On June 9, 2021, after reviewing reports by a neutral investigator and Girardi’s
 5 court-appointed counsel, the probate court conducted a hearing to determine if the
 6 conservatorship should become permanent. *See* Cal. Prob. Code § 1454(a) (“the court
 7 investigator shall be an officer or special appointee of the court with no personal or
 8 other beneficial interest in the proceeding.”). No objections were filed, even though the
 9 court had invited objections to proceedings to make the conservatorship permanent.
 10 During the hearing, the court asked Girardi if he had any objection to a permanent
 11 conservatorship. Girardi responded, “not at this time,” before adding, “I think that we
 12 should put together reasons why the conservatorship should be dissolved and then we’ll
 13 address the court, but right now I have nothing to say to the court.” Desiree Murphy,
 14 *Erika Jayne’s Estranged Husband Tom Girardi Disagrees With Conservatorship But*
 15 *Doesn’t Object “Right Now,”* KVUE (June 10, 2021).¹⁶

16 The probate court found by clear and convincing evidence that Girardi: (i) had “a
 17 Major Neurocognitive Disorder,” (ii) was “unable properly to provide for his or her
 18 personal needs for physical health, food, clothing, or shelter,” (iii) was “substantially
 19 unable to manage his or her financial resources or to resist fraud or undue influence,”
 20 and (iv) had “dementia as defined in Probate Code section 2356.5.” (Ex. 21, p. 1-4)

21 **B. Over his objection, Girardi was placed in an assisted living**
 22 **facility after suffering another fall.**

23 ***The Second Fall.*** On July 31, 2021, Girardi was rushed to the emergency room
 24 at Huntington Hospital after falling and suffering a black eye and syncope (loss of
 25 consciousness). (Ex. 22, p. 1.) Girardi could not explain what happened and did not
 26

27 ¹⁶ Available at <https://www.kvue.com/article/entertainment/entertainment-tonight/erika-jaynes-estranged-husband-tom-girardi-disagrees-with-conservatorship-but-doesnt-object-right-now/603-3317824b-b76a-49af-b8a2-bd51764a354e>.
 28

1 know if he had fallen or bumped into something. [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
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10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26
27 [REDACTED]
28 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 Despite his obvious impairment, Girardi expressed strong opposition to the
7 medical team's recommendation he enter an assisted living. He was very upset, saying
8 their recommendation was "shitty." (Ex. 26, p. 1.) Even after he was told that the
9 recommendation was for his own safety, Girardi objected and did not want to accept
10 the placement.¹⁹ (*Id.*)

11 [REDACTED] Girardi's family, with assistance from the hospital social
12 worker, began a search for an assisted living facility with availability. After contacting
13 several facilities, the family identified [REDACTED] as a
14 placement. [REDACTED]
15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22
23

24 [REDACTED]
25 [REDACTED]
26 ¹⁹ Girardi repeatedly objected to placement in an assisted living facility. During
27 the intake interview at [REDACTED] Girardi insisted he wanted to return home with his
28 caregiver Isabelle [REDACTED] time of discharge, Girardi told the nurse that he did
not want to go to [REDACTED] and wanted to go home.

1 [REDACTED] Girardi was discharged directly to [REDACTED] on August 9,
2 2021. (Ex. 29.)

3 [REDACTED] conducted its own assessment of Girardi during intake. They
4 noted that Girardi had both “dementia” and “MCI.” The service plan called for standby
5 assistance in and out of the shower, setting up toiletries, verbal cues for dressing and
6 grooming, cues for brushing teeth morning and night, prompts to eat meals, escorts
7 resident, and a note that Girardi was at for risk of falls.

8 [REDACTED] In June 2022, Girardi’s family began the process of transferring
9 him to the [REDACTED]. On June 24, 2022, [REDACTED]
10 conducted a brief mental status interview, during which Girardi was only able to repeat
11 two of three words, required cueing to recall two of the three words, and could not
12 report the correct month or day of the week. (Ex. 30, p. 7.)

13 Girardi was transferred to a locked memory ward at [REDACTED].
14 The Memory Care program is a secured area on the third floor where residents of
15 cannot wander off without supervision. The elevator will only stop on the third floor
16 with an employee code, and the elevator can only be summoned from the third floor if
17 an employee inputs the code. During the intake process, [REDACTED] staff prepared an
18 assessment and service plan. The care manager went over Girardi’s background, health,
19 abilities and interests to identify appropriate interventions. For personal activities,
20 Girardi noted that he “enjoy[ed] reviewing law cases and working on paperwork
21 outside or in the library.” (Ex. 31, p. 4.) Girardi’s daily routine included “work[ing] on
22 my ‘law work and cases’ by myself.” (*Id.*) Girardi denied that he has a short attention
23 span or was forgetful despite being unable to recall the time or where he was. Girardi
24 noted “no history of falls,” despite being hospitalized for a fall in 2021. (*Id.*, at p. 13.)
25 Girardi was “unable to remember [his] surroundings.” (*Id.*, at p. 7.) Instead, Girardi
26 believed the assisted living was a “work retreat where [he] take[s] meetings and
27 work[s] on cases away from home.” (*Id.*) Even though Girardi could not leave the
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1 facility, he identified interests to be “golf” and “reviewing my law cases.” (*Id.*, at p. 8.)
2 In terms of activities, Girardi stated that he liked “to take time to myself in a library
3 setting, to review my cases and work.” (*Id.*, at p. 18.)

4 While at [REDACTED] the staff documented Girardi’s decline. Despite being informed
5 he is in an assisted living facility, Girardi “spends most of his time in his room napping
6 or at his desk ‘working on legal cases.’” (Ex. 32, p. 1.) “With encouragement, he
7 occasionally joins for lunch/dinner in the dining room or out on the patio but prefers to
8 sit alone to ‘work’” (*Id.*) On some days, he will take his “paperwork” to lunch.
9 (Ex. 33.)

10 Several occurrences highlight Girardi’s complete lack of awareness at [REDACTED] In
11 October 2022, Girardi was told that he would be getting a new roommate. Girardi
12 responded that he didn’t live here and that he would be gone later today. (Ex. 34.)
13 Similarly, Girardi’s forgetfulness was apparent when he tested positive for COVID on
14 October 29, 2022. Girardi was subject to isolation protocol, which was explained to
15 him. Throughout the isolation, however, he required “constant reminders” about the
16 need to follow the restrictions. (Ex. 35) (“Resident continues on isolation precaution
17 with constant reminders”; “Resident is on isolation precautions but needed constant
18 reminders”; “Resident needed constant reminders that he’s on isolation precautions.”)
19 Following his recovery, Girardi resorted to “attending to his paperwork per his usual
20 routine. (Ex. 36) (“Resident was seen in the dining area, attending to his paperwork per
21 his usual routine.”; (Ex. 37) (“Resident was seen in the dining area after breakfast,
22 attending to his paperwork per his usual routine.”)

23 [REDACTED] [REDACTED] the Program Coordinator for the memory ward at [REDACTED], has
24 interacted with and observed Girardi since his arrival in June 2022. According to
25 [REDACTED] throughout Girardi’s time at [REDACTED] he has spent every day writing either on
26 legal pads or loose paper. Girardi claims he is “working on his cases.” (Ex. 38, p. 2.)
27 The staff was instructed not to move his paperwork or cellphone of gets because
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1 Girardi becomes very upset if he feels that his legal work has been disturbed. (*Id.*)
 2 According to [REDACTED] Girardi is in a cycle where every day he mimics a lawyer
 3 representing clients even though he is no longer an attorney and is living at [REDACTED]
 4 (*Id.*) Occasionally, Girardi will ask staff to call his car to take him to his law office.
 5 (*Id.*) The staff placates Girardi by assuring him that the car has been called and it's on
 6 the way until Girardi eventually forgets about his request. (*Id.*)

7 Since his arrival, [REDACTED] has noticed a drastic decline in Girardi's selfcare.
 8 (*Id.*, at p. 1.) He no longer changes his clothes regularly and often wears the same
 9 clothes on multiple days. Even with prompting to change, Girardi will remove
 10 dirty clothing from the hamper and wear them again. (*Id.*, at p. 2.) Girardi's
 11 bathroom must be regularly cleaned since Girardi started using a towel to clean
 12 himself after bowel movements. (*Id.*)

13 In recent months, staff have notice that Girardi's functioning has gotten
 14 worse and has required greater care. [REDACTED] was interviewed by defense counsel on
 15 April 20, 2023 and June 23, 2023. During the second interview, [REDACTED] confirmed
 16 that Girardi now needs someone to stand outside the shower and provide him with
 17 prompts, like reminders to use soap, and reminders to brush his teeth every
 18 morning. (Ex. 39.)²⁰

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25 ²⁰ [REDACTED] was also asked about Dr. Diana Goldstein's claim that [REDACTED] said,
 26 "[Girardi] says to lawyers, 'I don't want to speak to anyone if I was a doctor.'" (*Id.*;
 27 see also ECF [REDACTED] 4, at 96.) Ms. [REDACTED] categorically denied the allegation. (Ex. 39.)
 28 Ms. [REDACTED] confirmed that [REDACTED] told Dr. Goldstein that the "ED," referring to the
 [REDACTED] Executive Director, told Ms. [REDACTED] to limit her conversations about Girardi.
 As set forth below, this one of many reasons the Court must hear directly from lay
 witnesses during the competency hearing. (*Id.*)

III. THREE INDEPENDENT EXPERTS—A NEUROLOGIST, NEUROPSYCHOLOGIST, AND INDEPENDENT LEGAL EXPERT—CONFIRM THAT GIRARDI IS COGNITIVELY IMPAIRED AND NOT COMPETENT TO STAND TRIAL.

A. Consistent with the numerous other professionals who have evaluated Girardi, Dr. Helena Chui—Chair of Neurology at USC Keck School of Medicine—concluded that Girardi suffers from dementia.

Dr. Helena Chui, Chair of Neurology at USC Keck School of Medicine, examined Girardi beginning in April 2021 and most recently in May of 2023. (Ex. 43) After reviewing Girardi’s medical records, including prior brain scans, and ordering additional tests and conducting an evaluation, Dr. Chui offered her expert opinion in four areas: (1) Girardi’s medical condition and its etiology, (2) severity of the condition, (3) progression, and (4) prognosis. Dr. Chui concluded that Girardi suffers from “dementia due to a progressive, irreversible neurodegenerative disorder.” (*Id.*, at p. 6)

In 2021, Dr. Chui originally concluded that the likely cause of Girardi’s dementia was Alzheimer’s disease. That conclusion was based on severe impairment in episodic memory and evidence of severe and progressive atrophy of the hippocampus and anterior temporal lobe, hallmarks of Alzheimer’s disease. (*Id.*) With the benefit of a recent amyloid PET scan, however, Dr. Chui ruled out Alzheimer’s disease based on the absence of amyloid plaque.²¹ (*Id.*, at p. 7) Instead, Dr. Chui concluded that the most likely etiological diagnosis is “hippocampal sclerosis of the elderly” or, using more

²¹ “[N]eurodegenerative disorders are associated with the accumulation of misfolded protein, in disordered processes referred to as proteinopathies. Alzheimer disease is characterized by beta-amyloid plaques and phosphorylated neurofibrillary tangles.” ECF No. 60, at 115.

1 recent nomenclature, Limbic predominant Age-related TDP43 Encephalopathy
2 (LATE).²²

3 Dr. Chui concluded that the atrophy or volume loss of Girardi's hippocampi was
4 "extreme." (*Id.*, at p. 4) Relying on quantification software (NeuroQuant) of the MRI
5 imaging from 2021 and 2023, Dr. Chui placed Girardi's hippocampal atrophy in the
6 bottom one percentile of patients his age. Dr. Chui explained how the extensive atrophy
7 of the frontal lobes and hippocampi would affect Girardi. Because the hippocampi "are
8 essential for encoding new episodic memories, . . . [a]trophy of the hippocampi are
9 associated with impairments in learning and retaining new information." (*Id.*) Thus,
10 Girardi's loss of short-term memory and perpetual repetition of the same stories from
11 the past are explained by severe atrophy of his hippocampi. His loss of insight,
12 confabulation, repetitive behaviors (calling clients, writing notes) suggest a frontal lobe
13 component to his memory disorder. (*Id.*)

14 Regarding severity, Dr. Chui scored Girardi as a 2-Moderate on the Clinical
15 Dementia Rating (CDR) scale.²³ Dr. Chui concluded this based on her most recent
16 examination of Girardi, recent neurological testing results, and information regarding
17 Girardi's day-to-day functioning from his caregiver at [REDACTED]. Dr. Chui's CDR score
18 was based upon her findings that Girardi "has severe impairment in memory, is
19 disoriented to time and place, has significant impairment in problem solving and
20

21 ²² LATE is associated with TDP-43 cytoplasmic inclusions and usually
22 pronounced hippocampal atrophy

23 ²³ The Clinical Dementia Rating (CDR) is a global rating device that was first
introduced in a prospective study of patients with mild "senile dementia of AD type"
(SDAT) in 1982 (Hughes et al., 1982). New and revised CDR scoring rules were later
introduced (Berg, 1988; Morris, 1993; Morris et al., 1997). CDR is estimated on the
basis of a semistructured interview of the subject and the caregiver (informant) and on
the clinical judgment of the clinician. CDR is calculated on the basis of testing six
different cognitive and behavioral domains such as memory, orientation, judgment and
problem solving, community affairs, home and hobbies performance, and personal care.
The CDR is based on a scale of 0–3: no dementia (CDR = 0), questionable dementia
(CDR = 0.5), MCI (CDR = 1), moderate cognitive impairment (CDR = 2), and severe
cognitive impairment (CDR = 3). T.K. Khan, *Biomarkers in Alzheimer's Disease*,
Academic Press (2016),

1 judgment, he no longer drives by himself, and is unable to perform outside activities,
 2 perform simple home activities and hobbies [hard to evaluate and residential care
 3 facility where these needs are handled by staff] , and needs some help with dressing and
 4 toileting, [mostly for hygienic reasons].” (*Id.*, at pp. 8-9.)

5 Dr. Chui opined the progression of Girardi’s dementia began before the car
 6 accident in 2017. However, the concussion accelerated the deterioration, “produc[ing] a
 7 step-wise cognitive decline upon what would otherwise be a slowly progressive
 8 course.” (*Id.*, at p. 9.) Since that time, the dementia has remained on a slow progression
 9 from 2021 forward.

10 Finally, Dr. Chui offered a poor prognosis: “There is currently no disease-
 11 modifying treatment, therefore dementia will continue to worsen.” (*Id.*, at p. 10.)
 12 Similar to other neurocognitive disorder, LATE/hippocampal sclerosis, has a “slowly
 13 progressive decline, which often accelerates as the disease progresses.” (*Id.*, at p. 9.)

14 **B. Dr. Stacey Wood, a neuropsychologist with expertise in geriatric**
 15 **neuropsychology, concluded Girardi has a Major Cognitive**
 16 **Disorder that renders him incompetent to stand trial.**

17 In May 2023, Dr. Stacey Wood, a neuropsychologist who specializes in
 18 evaluating the elderly and has both clinical and forensic experience, examined Girardi.
 19 (Ex. 42.) Dr. Wood’s evaluation included testing, multiple in-person meetings over a
 20 week-long period, review of records, and collateral interviews, including with Girardi’s
 21 counsel.

22 **1. Neuropsychological Testing Provided Objective Measures of**
 23 **Girardi’s Poor Episodic Memory and Executive Functioning**

24 Neuropsychological testing provided the clearest measure of Girardi’s cognitive
 25 decline in two key areas: (a) memory and (b) executive functioning. (*Id.*, at p. 12.)

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a. Girardi's Memory Testing Showed an Inability to Learn and Apply New Information

Testing data showed Girardi's verbal memory is significantly impaired. He scored in the bottom one-fourth of people his age in immediate memory recall. His delayed recall was even worse, scoring in the "mildly impaired range." (*Id.*, at p. 12.) When performing the CVLT-3, a test to assess his ability to learn new information, Girardi "performed in the mildly to severely impaired range." (*Id.*) Girardi's recall ability over time went from bad (18th percentile) to worse (5th percentile) to the statistical bottom (1st percentile), when he could not recall even one word of a 5-word list. (*Id.*) Cuing only slightly improved his performance. Girardi scored slightly better on a recognition format test. But because he had a high number of "false alarms," he was scored to be moderate impairment. (*Id.*) As Dr. Wood explained, "[t]hese results indicate that he had a poor ability to learn new words, even with repetition, and had difficulty discriminating between true items and foils." (*Id.*)

Girardi’s visual memory was also impaired. When taking the Wechsler Memory Scales Visual Reproduction subtest, which requires the participant to draw figures, he scored in the borderline to low average range and dropped to the bottom percentile when asked to reproduce the figures after a significant delay. Girardi had similar results for visual memory using the Rey Figure Test: Girard’s initial performance placed him in the “mild to moderately impaired range.” (*Id.*) He could recall some details immediately after viewing the figure but “after a 20 min delay, he could not recall any details and scored in the severely impaired range (1st percentile).” (*Id.*, at pp. 18-19.) In Dr. Wood’s opinion, “Girardi demonstrated a deficit in learning new information and retaining it across test modalities (verbal and visual).” (*Id.*, at p. 19.)

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b. Testing of Executive Function Showed Cognitive Inflexibility Impedes Girardi's Ability to Follow Complex Instructions.

“Executive functioning refers to the ability to plan, think flexibly, monitor one’s behavior, and regulate emotion.” (*Id.*) In testing abstract reasoning, Girardi was considered “average” or “37th percentile.” (*Id.*) Girardi did about the same in his ability for error monitoring and response inhibition. (*Id.* at p. 19) His performance was low average for conditions of color naming (25th percentile), was average for word reading (37th percentile), and was average for color-word interference (37th percentile). (*Id.*) Where Girardi performed poorly, however, was in trying to follow two streams of information, placing him in the 16th percentile, which was “low average range.” (*Id.*) Girardi also performed in the low average range on a task of cognitive flexibility that required him to track two streams of information (Trails B, 16th percentile). (*Id.*) When presented with a fourth condition, Girardi lacked the ability to understand. Even when the instructions were repeated and Girardi was given an opportunity to practice, he remained confused and had to stop.

Tests designed to assess Girardi’s strategy and problem-solving ability showed Girardi performed well with one critical deficiency: the inability to maintain a set of instructions and recall complex rules. For the DKEFS Tower test, Girardi’s overall metric of achievement was in the average range. For tasks associated with reasoning, Girardi performed in the top 74th percentile, “the high average range.” (*Id.*) For the specific measure dealing with rule violations, however, Girardi could not consistently apply the rules and scored in the lowest percentile. (*Id.*) Dr. Wood concluded that although “Girardi performed fairly well across tasks of executive functioning, . . . he evidenced difficulty maintaining a set of instructions and recalling complex rules.” (*Id.*)

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c. Girardi's Performance on Tests Designed to Ensure Full Effort Confirm Girardi's Deficiencies Did Not Result From a Lack of Effort

Dr. Wood employed performance validity measures to ensure the test results reflect Girardi's actual ability. All measures including both standard alone tests and embedded measures showed that Girardi adequately applied himself throughout the testing. As summarized by Dr. Wood:

Girardi was administered two standardized tasks to assess his level of motivation and effort (TOMM and Dot Counting). His scores on both of these measures are valid and are consistent with an individual with adequate motivation. Embedded measures also indicated good effort (Digit Span, CVLT-3 forced choice). In addition, Girardi performed in the average range on many measures that should not be impacted by temporal lobe brain changes (e.g., word reading). Overall, the tests results indicated adequate effort.

(*Id.*, at p. 16.)

d. Girardi's Performance on a Specific Competency Test Demonstrated His Lack of Insight and Memory Deficits Impeded His Ability to Assist With Counsel

Dr. Wood administered the Fitness Interview Test-Revised (FIT-R) which is an established structured interview for assessing a person's competence to stand trial. Dr. Wood found that Girardi demonstrated a strong factual understanding of court proceedings. However, she found he had almost no ability to "apply his knowledge to his own situation and to utilize it." (*Id.*, at p. 28.) For example, Girardi was unaware of his current charges and thought he was represented by a former colleague, rather than the Federal Public Defender. Girardi also had no appreciation of how his memory limitations would impact his case. He remained confident that he could testify noting that despite memory lapses, he needed only to "pause a bit" before answering the questions. (*Id.*, at p. 27.) Girardi, despite having been a veteran trial lawyer, was "100%" convinced he would be acquitted with no thought of the inherent risks of proceeding to trial. (*Id.*, at p. 25.) Dr.

1 Wood found that Girardi's "inability to recall and retain case specific information"
2 would impede his ability to assist counsel. (*Id.*, at p. 28.)

3 **2. Subsequent Interviews Over Multiple Days Further**
4 **Confirmed Girard's Severe Memory Impairment**

5 Besides testing, Dr. Wood conducted several interviews of Girardi to
6 evaluate his memory of case-specific matters. Despite providing Girardi with
7 relevant information, repeated reinforcement, and even when aided by notetaking,
8 Dr. Wood found that Girardi had almost no recall of the facts and total lack of
9 insight into his current circumstances.

10 After concluding the testing, Dr. Wood met with Girardi three additional
11 times. While Girardi could provide a few pieces of information about his case, he
12 could not provide any specific details. On the first day, May 20, 2023, Dr. Wood
13 attempted to assess Girardi's baseline knowledge of his circumstances. Girard was
14 unaware of his case ("What case?"), unaware of his disbarment (saying he was in
15 court "two weeks ago") and was unaware of any bankruptcy ("I also have a house
16 in the desert and own the law firm property"). (*Id.*, at pp. 29-30.) Girardi insisted
17 he is "living" at his former home in Pasadena and was at the [REDACTED] memory ward
18 "just for meetings, near here." (*Id.*, at p. 30.)

19 During the interview, Dr. Wood also discussed the indictment, covering the
20 allegations regarding all five clients. Girardi was given a pen and paper for
21 notetaking. When meeting with Girardi the following day, however, he summoned
22 almost no facts Dr. Wood had discussed. ("I know you said five of them, but I
23 don't recall any details.") (*Id.*)

24 Upon Dr. Wood's return a week later, Girardi had no recollection of who
25 Dr. Wood was, much less the facts. Girardi was not aware of any pending case
26 against him. When prompted with information regarding a pending indictment,
27 Girardi claimed he had a lawyer from his non-existent firm working on the case.

1 In Dr. Wood's opinion:

2 [Girardi] had a poor ability to recall previous conversations . . .
3 regarding some of the basic information related to his case found in the
4 indictment. . . [A]fter about a week, even when he brought his notes, he
5 did not recall anything substantive regarding the previous conversations
6 with this examiner about the clients or cases involved, his current legal
7 representation, or steps to take to assist.

8 (*Id.*, at p. 32.)

9 **3. Dr. Wood Found That Girardi Suffered From a Major
10 Neurocognitive Disorder Rendering Him Incompetent to
11 Stand Trial**

12 Applying the diagnostic criteria from the DSM-5-TR, Dr. Wood diagnosed
13 Girardi with "Major Neurocognitive Disorder – Not Specified." As Dr. Wood
14 explained:

15 Neuropsychological testing indicated mild to severe impairments in
16 episodic memory for both visual and verbal material. Girardi also
17 evidenced significant retrograde amnesia for recent aspects of his
18 personal history. He was not oriented to place, aspects of time, or
19 situation. Girardi had a tendency to confabulate and confuse events.
20 Girardi needs assistance with financial management and medication
21 management.

22 (*Id.*, at p. 36.)

23 Regarding severity, Dr. Wood concluded that Girardi met the criteria for Major
24 Neurocognitive Disorder-Mild. This is based upon "impaired IADLs (medication,
25 finances, transportation, meal prep) with relatively intact ADLs (dressing, eating)."
26 (*Id.*)

27 Dr. Wood concluded "with a reasonable degree of certainty that Girardi is not
28 currently competent to proceed to trial." (*Id.*, at p. 37) Dr. Wood acknowledged that
29 "[w]hile he retains a good factual understanding of court proceedings, [Girardi] lacks
30 the sufficient ability to consult with his attorney with a reasonable degree of rational
31 understanding." (*Id.*) Dr. Wood explained precisely how Girardi's impairments would
32 prevent him from assisting with his defense:

[I]t is Girardi's poor episodic memory, inability to learn new information, poor insight, and disorientation that impairs his ability to assist counsel. These impairments impact his ability to retain and evaluate the evidence against him and make sound decisions in light of the information. These impairments would also impair his ability to follow testimony of witnesses during a trial, even with notes. These impairments would even impair his decision to testify and impair his ability to testify accurately and relevantly.

(*Id.*)

Dr. Wood's conclusions were based not only on her direct observations but accounts from collateral witnesses and counsel. Specifically, Dr. Wood interviewed Girardi's housekeeper, Isabella Mancilla, reviewed an interview of Girardi's care manager, and interviewed Girardi's current counsel.²⁴

4. Dr. Wood's Opinion Is Consistent With Prior Experts Who Evaluated Girardi

Dr. Wood's findings follow prior assessments and an expected decline given Girardi's dementia diagnosis.

²⁴ Summarized statements of Mancilla, and Girardi's counsel are included in other sections of the statement of 1 d are not repeated here.

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[REDACTED]

C. Former and Current Counsel, as well as an Independent Legal Expert, Confirm Girardi’s Inability to Understand or Assist in his Defense.

Based upon interactions with Girardi, both former and undersigned counsel believe Girardi is unable assist properly in his own defense.

1. Girardi Could Not Assist Former Counsel During Prior Legal Proceedings and Preindictment Stage.

In late 2020, Girardi faced several adverse legal actions. After learning of potential criminal charges, Girardi’s brother, Robert Girardi, retained legal counsel, Evan Jenness to represent Girardi in contempt proceedings relating to the Lion Airlines case. Just a month after the proceedings, Girardi “recalled nothing or little about the proceedings themselves” and “nothing about the facts underlying those judgments.” Jenness observed that Girardi had “no or little recollection of any recent events – places he has been even several days ago, people he has seen, or things he has been told.” Despite having repeatedly met with her client, Girardi “appeared not to initially recognize [her] each of the times we have met in person.” Jenness further observed that Girardi “does not recall, or inaccurately relates, recent past history.” While Girardi had a better recollection of past events, “at times he confabulates to fill in obvious gaps in his recollection.” Jenness reported that Girardi repeatedly asks the same questions, receives the same answer, and then

1 forgets that he had asked the question. Finally, despite have being informed that his
2 law firm no longer exists, Girardi persists in the belief he has been to the office and
3 his employees are still there.

4 **2. Girardi Is Presently Unable to Properly Assist Current**
5 **Counsel with the Preparation of His Defense.**

6 Two years later, Girardi's cognitive functioning has appeared to decline, and
7 his memory impairments and general cognitive dysfunction continue to impede his
8 ability to assist counsel in defense of indictments on two federal cases. In February
9 2023, the Office of the Federal Public Defender was appointed to represent Girardi
10 in the Central District of California. At Girardi's initial appearance, the court
11 granted the defense's application for an order to conduct a competency
12 determination. Soon after, counsel began the process of regularly meeting with
13 Girardi to discuss the allegations and discovery underlying the indictment. Counsel
14 experienced many of the same problems that Jenness described in 2021.

15 Specifically, "the client had no recall meeting to meeting and sometimes no recall
16 from earlier in a meeting." Despite meeting with Girardi multiple times, including
17 successive days, Girardi had no recollection of who they were. Further, despite
18 counsel repeatedly informing Girardi of his situation—disbarment, firm
19 dissolution, and involuntary bankruptcy—Girardi "repeatedly informed counsel of
20 his understanding that he owned a house in Pasadena and had other assets."

21 Following a thorough review of the indictment, including the underlying
22 documents relating to the different victims, Girardi was unable to retain any
23 information beyond a general understanding that the case involved allegations that
24 the firm failed to settle clients. Even after repeated discussion of the simplest
25 allegation involving "Client 2" and the underlying records, Girardi could not retain
26 the information, sometimes even during the same interview. "[T]he next day he
27 had no recollection of the specifics of the indictment." Girardi denied having been
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1 ever shown the charging document at the next meeting. Although counsel tried to
2 help him compensate for his memory impairment by directing him to take notes,
3 this proved futile. And despite repetition and having his notes available, Girardi
4 was “unable to keep up” and “would get confused in the details.” When counsel
5 discussed the course of investigation, Girardi defaulted to saying he would talk to a
6 particular employee at the firm—even after having been told that the firm no
7 longer exists. In sum, “despite attempting to prep him and assist him by
8 compensating for his memory deficits, they were unable to make progress, because
9 he was unable to recall previous conversations and his current personal
10 circumstances, including the status of Girardi Keese, current resources, and current
11 allegations.” (Ex. 42, at p. 33.) Additionally, counsel, aware of Girardi’s lack of
12 insight, recognize that it will have deleterious impact on decisions made
13 exclusively by the client including whether to proceed to trial or plead guilty, the
14 objective of his defense, and whether to exercise the right to testify or remain
15 silent.

16 **3. Independent Counsel Observed First-Hand Girardi’s**
17 **Inability to Assist with his Defense.**

18 Katherine Corrigan has been a member of the California bar for almost 36 years.
19 She is a former prosecutor and a member of Corrigan Welbourn & Stokke, APLC. Her
20 firm’s practice is limited to criminal defense, and she has extensive experience
21 representing individuals facing criminal prosecution in state and federal court,
22 including for fraud offenses. She has received several awards and accolades for her
23 accomplishments, including the 2018 Life-Time Achievement Award, the Judge
24 Alicemarie H. Stotler Award, which was bestowed upon her by the Federal Bar
25 Association of Orange County in recognition of Ms. Corrigan’s excellence in federal
26 practice and contributions to the legal community and the Central District of California.

Corrigan sat observed four meetings between Girardi and his counsel. (Ex. 44.) Those meetings are described in over twelve pages of single-spaced text in the notice. (*Id.* at p. 4-12.) Based on Ms. Corrigan’s observations, her review of discovery specific to alleged victims, and her training and experience as a practicing attorney for almost 36 years, it is Ms. Corrigan’s opinion that Girardi appears unable to properly assist in his defense. (*Id.* at p. 16-17.) Ms. Corrigan explains,

Girardi appear to struggle to retain basic information regarding his case, no matter how many times his attorneys discussed the allegations and evidence with him. In addition, . . . Girardi appeared not to be oriented to the status of his present circumstances, including the fact that his firm was no longer in operation, that he was no longer a licensed attorney, that he resided in the memory unit at an assisted living home rather than his house in Pasadena, and that he was represented by appointed counsel, even though his counsel repeatedly reminded him of these facts. Girardi’s forgetfulness occurred across each meeting and also sometimes occurred within the same meeting. Whatever information Girardi appeared to have absorbed during the course of each meeting, he appeared to have no recollection at the following meeting, even the ones that occurred just twenty-four hours later. Girardi’s apparent inability to retain or recall basic information about his case would prevent him from assisting with his defense at every stage of his case.

LEGAL STANDARD

I. DUE PROCESS PROHIBITS THE PROSECUTION OF AN INCOMPETENT DEFENDANT.

The Supreme Court has “repeatedly and consistently recognized that ‘the criminal trial of an incompetent defendant violates due process.’” *Cooper v. Oklahoma*, 517 U.S. 348, 354 (1996) (quoting *Medina v. California*, 505 U.S. 437, 453 (1992)); *Drope v. Missouri*, 420 U.S. 162, 171 (1975) (“It has long been accepted that a person whose mental condition is such that he lacks the capacity to understand the nature and object of the proceedings against him, to consult with counsel, and to assist in preparing his defense may not be subjected to a trial.”). In *Cooper*, the Court explained:

Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one’s own behalf or to remain silent without penalty for doing so.

1 *Id.* (quoting *Riggins v. Nevada*, 504 U.S. 127, 139-140 (1992) (Kennedy, J.,
2 concurring)).

3 For a defendant, “the consequences of an erroneous determination of competence
4 are dire. Because he lacks the ability to communicate effectively with counsel, he may
5 be unable to exercise other ‘rights deemed essential to a fair trial.’” *Id.* at 364 (quoting
6 *Riggins*, 504 U.S. at 139 (Kennedy, J., concurring)). The defendant must also be able
7 to make rational decisions, including “whether to plead guilty, waive trial by jury,
8 testify on his own behalf, or take an appeal.” *Florida v. Nixon*, 543 U.S. 175, 187-88
9 (2004) (internal quotation marks omitted).

10 Given that the consequences of an erroneous competency determination are
11 grave, the Supreme Court has held that a district court cannot find a defendant
12 competent merely because he or she “[is] oriented to time and place and [has] some
13 recollection of events.” *Dusky v. United States*, 362 U.S. 402, 402 (1960). A simple
14 understanding of the superficial facts of the legal proceedings is not adequate to meet
15 the standard of possessing a rational and factual understanding of the proceedings
16 against a defendant—a defendant must have some ability to draw rational conclusions.
17 *United States v. Giffen*, 2019 WL 2720216, at *2 (D. Or. May 28, 2019), *report and*
18 *recommendation adopted*, 2019 WL 2718485 (D. Or. June 28, 2019), *aff’d*, 839 F.
19 App’x 168 (9th Cir. 2021). Competence requires more than the ability to passively
20 observe: “it requires the mental acuity to see, hear and digest the evidence, and the
21 ability to communicate with counsel in helping prepare an effective defense.” *Odle v.*
22 *Woodford*, 238 F.3d 1084, 1089 (9th Cir. 2001). The “test must be whether [the
23 defendant] has sufficient present ability to consult with his lawyer with a reasonable
24 degree of rational understanding -- and whether he has a rational as well as factual
25 understanding of the proceedings against him.” *Id.*

26 //

27 //

**II. THE GOVERNMENT BEARS THE BURDEN OF PROVING
GIRARDI'S COMPETENCY BY A PREPONDERANCE OF THE
EVIDENCE.**

The government “has the burden of demonstrating by a preponderance of the evidence that the defendant is competent to stand trial.” *United States v. Frank*, 956 F.2d 872, 875 (9th Cir. 1991); *United States v. Hoskie*, 950 F.2d 1388, 1392 (9th Cir. 1991). A defendant is incompetent to stand trial if either: (1) they are unable to understand the consequences of the proceedings, or (2) they are unable to assist properly in their defense. 18 U.S.C. § 4241(d). Thus, if the government fails to prove by a preponderance of the evidence that the defendant *both* understands the consequences of the proceedings *and* is able to assist properly in his or her defense, the court must find the defendant incompetent. *See id.*

**III. THE DEFENDANT HAS A RIGHT TO FULL AND FAIR
COMPETENCY HEARING.**

Section 4241 sets forth the procedures to determine the competency of a defendant in federal court, from a motion to a psychological examination, to a report, to a hearing. Once the court concludes that “there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent,” a competency hearing is required. 18 U.S.C. § 4241(a) (“The court shall grant the motion, or shall order such a hearing on its own motion”); § 4241(c) (“The hearing shall be conducted pursuant to the provisions of section 4247(d).”). The defendant has a statutory right to a robust hearing. *United States v. Gillenwater*, 717 F.3d 1070, 1077 (9th Cir. 2013) (“Congress recognized that such procedural safeguards were, at a minimum, desirable, if not constitutionally mandated.”). The law mandates that “the person whose mental condition is the subject of the hearing . . . shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses . . . and to confront and cross-examine witnesses . . .” 18 U.S.C.

1 § 4247(d). Competency hearings equal a competency trial, often over multiple days
2 with the expert and lay witnesses testifying.

3 In making the competency determination, a district court should consider a
4 variety of information. *See Drope v. Missouri*, 420 U.S. 162, 180 (1975). “Relevant
5 evidence falls into three broad categories: medical history, the defendant’s behavior in
6 and out of court, and defense counsel’s statements about the defendant’s competency.”
7 *United States v. Garza*, 751 F.3d 1130, 1134 (9th Cir. 2014); (citing *United States v.*
8 *Marks*, 530 F.3d 799, 814 (9th Cir. 2008)). However, because the “applicable criteria
9 measure one’s ability to consult *with his lawyer* and to understand the course of *legal*
10 *proceedings*,” defense “counsel’s first-hand evaluation of a defendant’s ability to
11 consult on his case and to understand the charges and proceedings against him may be
12 as valuable as an expert psychiatric opinion on his competency.” *United States v.*
13 *David*, 511 F.2d 355, 360 (D.C. Cir. 1975) (emphasis in original); *see also Hernandez*
14 *v. Ylst*, 930 F.2d 714, 718 (9th Cir. 1991) (though not determinative, “a defendant’s
15 counsel is in the best position to evaluate a client’s comprehension of the
16 proceedings.”).

17 Courts also routinely consider the testimony of lay witnesses. *United States v.*
18 *Benson*, No. 12-CR-00480-YGR-1, 2015 WL 1869476, at *2 (N.D. Cal. Apr. 22,
19 2015); *Bundy v. Dugger*, 675 F.Supp. 622, 634 (M.D.Fla.1987) (“[T]he Court may rely
20 on, in addition to expert testimony, lay witness testimony.” *United States v. Mitchell*,
21 706 F.Supp.2d 1148, 1151 (D.Utah 2010) (“Lay witness testimony is especially
22 important where the evidence indicates a defendant may be malingering or
23 manipulating the system.”); *United States v. Boigegrain*, 155 F.3d 1181, 1189 (10th
24 Cir.1998); *United States v. Makris*, 535 F.2d 899, 905 (5th Cir.1976); *see also United*
25 *States v. Gigante*, 925 F. Supp. 967, 976 (E.D.N.Y. 1996) (relying on lay witness
26 testimony in concluding that defendant’s “actions and decisions were wholly
27 inconsistent with the behavior observed by the doctors”).

ARGUMENT

I. DEMENTIA IS WELL-RECOGNIZED NEUROCOGNITIVE DISORDER IMPACTING COMPETENCY.

“Dementia is the loss of cognitive functioning — thinking, remembering, and reasoning — to such an extent that it interferes with a person’s daily life and activities.”²⁵ Dementia is marked by symptoms such as “difficulties with memory, language, problem-solving and other cognitive skills.” “[It] is best characterized as a syndrome rather than as one particular disease.”²⁶ There are numerous pathologies that contribute to dementia, including Alzheimer’s Disease (AD), hippocampal sclerosis, Lewy bodies, cerebral amyloid angiopathy and atherosclerosis. One or more pathologies may be co-occurring and contributing to the dementia simultaneously. But the end result is the same: significant cognitive decline.

Dementia, just as any other mental disease, can render a defendant incompetent to stand trial. Studies demonstrate that for Alzheimer’s disease (the most common form of dementia), between 30% and 50% of criminal defendants older than 60 were incompetent. Catherine Lewis et al., *A Study of Geriatric Forensic Evaluatees: Who Are the Violent Elderly?* 34 J. AM. ACAD PSYCHIATRY LAW 324 (2006); Adonis Sfera et al., *Neurodegeneration Behind Bars: From Molecules to Jurisprudence*. FRONT PSYCHIATRY (Aug. 27 2014). Recognizing this risk to dementia patients, the American Bar Association states that “a diagnosis of dementia should call into question an individual’s competency to stand trial and criminal liability, as dementia may impair one’s ability to provide informed consent for their legal defense strategy and understand court proceedings.” *Persons Living with Dementia in the Criminal Legal System*, ABA Commission on Law and Aging Final Report (May 2022).

²⁵ *What Is Dementia? Symptoms, Types, and Diagnosis*, National Institute on Aging, available at <https://www.nia.nih.gov/health/what-is-dementia>.

²⁶ Seth A. Gale et al., *Dementia*. 131 AM. J. MED. 1161 (Oct. 2018).

1 Numerous courts, including the United States Supreme Court, have also
2 recognized that dementia can render a defendant incompetent by preventing the
3 defendant from forming a rational understanding. *See, e.g., Madison v. Alabama*, 139 S.
4 Ct. 718, 728 (2019) (holding that dementia, “which has compromised the person’s
5 cognitive functions,” can cause “the prisoner’s inability to rationally understand his
6 punishment” rendering him incompetent for execution); *United States v. Dreyer*, 705
7 F.3d 951, 965 (9th Cir. 2013) (finding the district court committed plain error by failing
8 to hold a competency hearing *sua sponte* based upon expert reports that the defendant
9 suffered from dementia); *United States v. Reese*, No. CR 18-39, 2018 WL 4854660, at
10 *4 (E.D. Pa. Oct. 5, 2018) (concluding that based upon the defendant’s dementia, he is
11 “unable to assist properly in his defense due to his mental condition” and is
12 “incompetent to stand trial.”); *United States v. Musto*, No. 10-338, 2014 WL 47351, at
13 *6 (M.D. Pa. Jan. 7, 2014) (finding defendant incompetent to stand trial based upon a
14 psychiatric diagnosis of “Mild Cognitive Impairment”); *United States v. Azure*, 279 F.
15 Supp. 2d 1093, 1096 (D.N.D. 2003) (finding defendant incompetent based upon
16 dementia).

17 Two cases addressing dementia and competency are instructive here. In *United*
18 *States v. Brown*, the defendant had been charged with a wire fraud scheme stealing six
19 million dollars. 147 F.Supp.3d 312 (E.D. Pa. 2015). After having been found competent
20 by psychiatrists at a federal correctional facility, the defendant was evaluated by
21 outside professionals. Neuropsychological testing revealed that the defendant had
22 difficulties in delayed recall, working memory executive function and visuospatial
23 function.” *Id.* at 316. Doctors concluded that she suffered from “dementia of the
24 Alzheimer’s Disease type.” *Id.* Neuroimaging demonstrated that the defendant’s
25 hippocampal volume placed her in the 15th percentile (low average range) and also
26 showed “minimal white matter disease,” which is “reflective of chronic microvascular
27 ischemia.” Moreover, “neuropsychological evaluation revealed prominent impairment
28

1 in episodic memory and confrontation naming and executive functioning was also
2 fairly consistently impaired.” A defense-retained forensic psychiatrist agreed with the
3 diagnosis of AD dementia and found the defendant incompetent to stand trial.
4 Specifically, the psychiatrist noted that the defendant “is incapable of planning legal
5 strategy, providing meaningful and accurate testimony, and/or assisting in cross-
6 examination of witnesses.” The government retained a forensic psychiatrist who also
7 concluded that the defendant was incompetent because in part “her memory deficits
8 cause her to be unable to maintain a *rational* and factual understanding of the
9 proceedings against her.” *Id.* at 323 (emphasis added). A court-appointed psychiatrist,
10 however, reached a different conclusion. Although the psychiatrist found that the
11 defendant “may have a Mild Neurocognitive Disorder, her presentation . . . did not
12 remotely suggest incompetence to stand trial.” *Id.* at 318.

13 The district court agreed with the conclusions that the defendant was
14 incompetent. The court acknowledged that the defendant factually understood her case.
15 *Id.* at 326 (“It seems clear that Defendant understands the general nature of the charges
16 against her, the roles of the participants in the criminal justice system, the purpose and
17 nature of a plea and the difference between a plea and a trial. Defendant also has a basic
18 understanding of her constitutional rights.”). But the court found that the defendant
19 could not assist her counsel by “direct[ing] her attorneys as to her wishes, consider[ing]
20 her attorney’s advice, and rationally evaluat[ing] possible courses of action.” *Id.* Based
21 upon review of the evidence, the district court concluded that based upon the
22 defendant’s dementia, she “does not presently have the adequate memory or executive
23 functioning skills to assist her counsel in a meaningful way.” *Id.*

24 In *United States v. Buckingham*, the defendant, a former physician, had been
25 charged with running “a pill mill” five years earlier. 2020 WL 7238273 (N.D. Ala. Dec.
26 9, 2020). A forensic neuropsychologist concluded that Buckingham suffered from the
27 “major cognitive disorder” dementia. *Id.* Although his “his immediate memory and
28

1 abstraction remain intact,” his attention, expressive language, visual skills, delayed
2 memory and executive function” were all impaired. The neuropsychologist concluded
3 that the dementia left the defendant unable to assist counsel with his defense:
4 “[his]severe memory loss, particularly after an intervening time period, and [his]
5 impairments in divided attention and mental flexibility, . . . would render him unable to
6 hold information in consciousness and be able to rationally make decisions regarding
7 such information.”

8 A forensic psychiatrist concurred in the opinion that Buckingham’s “cognitive
9 impairments likewise interfered with his ability to assist properly in his defense”:

10 Without foundational knowledge about his charges, [Defendant] would
11 be unable to follow testimony for contradictions and errors, bring
12 relevant information to his attorney's attention, testify and be cross-
13 examined, understand instructions and advice, and make rational and
14 informed decisions about the handling of his case.

15 The Government opposed, arguing that defendant’s behavior, including his high
16 education and intellect, rendered him competent. The magistrate judge who issued the
17 report and recommendation of incompetency, aptly noted despite Buckingham’s
18 background, his present dementia rendered him incapable of assisting counsel:

19 There is no question that the defendant is able to recall the general
20 medical practices, procedures, and terms that he employed during the
21 relevant period . . . That ability appears to be a consequence of decades of
22 medical experience. While such an ability is helpful in the preparation of
23 his defense, the difficulty resides in his inability to recall specific events,
24 facts, and relevant evidence from the charged period and make a rational
25 connection between those events, to the extent he can even recall them,
26 and the charged conduct.

27 The district court adopted the magistrate judge’s conclusion. Although finding
28 that the defendant had a general understanding of the nature of the proceedings, the
court found that he was unable to assist counsel:

[H]is mental condition renders him unable to recall events, assist in
evaluating the veracity of the claims against him, and rationally
undertake the decisions he must make to plead guilty or proceed to trial,
which include the decision to enter a guilty plea, waive his rights, and
whether to testify on his own behalf.

1 The district court cited not only Buckingham's inability to make consequential
2 decisions about his case, but his inability to meaningful participate in his trial. As the
3 district court explained, if the defendant was unable to discuss his case during his
4 evaluations, he certainly would not be able to do so in the heat of trial ("consist of
5 multiple days of both sides presenting evidence, cross-examining witnesses, and
6 offering arguments to the jury.").

7 **II. AS DIAGNOSED BY MULTIPLE NEUROLOGISTS AND AN**
8 **EMERGENCY ROOM DOCTOR, GIRARDI SUFFERS FROM**
9 **DEMENTIA**

10 Multiple neurologists in different contexts and at different times have concluded
11 that Girardi suffers from dementia. [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 [REDACTED] Each neurologist reached

19 their opinion only after conducting a neurological examination, including a test of
20 cognitive functioning, reviewing brain imaging, and consulting collateral witnesses.

21 //

22 //

23 //

24 //

25 [REDACTED]

26 [REDACTED]

27 [REDACTED]

28 [REDACTED]

First, Girardi's scores on the two standard cognitive screening tests, the MoCA²⁸ and the MMSE,²⁹ consistently placed Girardi in the cognitive impairment range:

Date	Physician	Test	Score
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
[REDACTED]	[REDACTED]	[REDACTED]	[REDACTED]
Apr. 13, 2023	Dr. Chui	MoCA	18/30

Other administrations of these cognitive tests produced similar results. [REDACTED]
[REDACTED]
[REDACTED].³⁰ Courts have found incompetency in cases involving defendants who scored higher on the MoCA than Girardi has since 2021. *See, e.g., United States v. Musto*, No. 3:10-CR-338, 2014 WL 47351, at *5 (M.D. Pa. Jan. 7, 2014) (“On the MoCA, Mr. Musto received a score of 23/30 . . .”).

Second, neuroimaging objectively confirmed a finding of dementia. Brain scans spanning a four-year period show increasing cerebral volume loss, most significantly hippocampal atrophy. Researchers have found “strong associations for dementia with volumes of the hippocampus. . .” Davis C. Woodworth et al., *Dementia is associated with medial temporal atrophy even after accounting for neuropathologies*, 4 BRAIN

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²⁸ The Montreal Cognitive Assessment (MoCA) is a screening test assessing global cognitive function that assesses memory, visuospatial ability, executive function, attention, concentration, working memory and orientation.

²⁹ Mini-Mental State Examination (MMSE) is a well-validated and widely used assessment of global cognitive function.

³⁰ Dr. Wood also administered the MoCA on May 23, 2023 and Girardi scored a 17/30.

1 COMMUNICATIONS 2 (2022). The only condition where the neuropathology showed an
2 association stronger than dementia generally was hippocampal sclerosis.³¹

3 While Girardi's neurologists did not definitively identify the neuropathology or
4 cause of cognitive decline, none wavered in their conclusion he suffered from
5 dementia. It's not surprising the neurologists initially thought Girardi suffered from
6 Alzheimer's disease (AD). AD mimics the neurological profile for LATE TDP,³²
7 especially hippocampal sclerosis.³³ Misdiagnosis of AD is not uncommon—studies
8 show it happens in about 20 percent of cases. Rachel M. Butler Pagnotti et al.,
9 *Cognitive and Clinical Characteristics of Patients With Limbic-Predominant Age-*
10 *Related TDP-43 Encephalopathy*. 100 NEUROLOGY (May 2023) ("Autopsy data further
11 suggest that a significant proportion, up to 20%, of patients with clinically diagnosed
12 AD were actually misdiagnosed based on neurologic examination and neuroimaging,
13 and patients' cognitive decline was likely more attributable to LATE-NC."). Although
14 the impetus for Girardi's brain scans in 2017 was to ascertain the extent of trauma
15 resulting from the car accident, physicians discovered significant volume loss. Girardi
16 was found to have substantial hippocampal atrophy, which has a strong association to
17 cognitive impairment.

18 Six years after the car accident, additional neuroimaging and testing was done on
19 Girardi. That imaging confirmed even more atrophy of Girardi's hippocampus. With
20 the benefit of this additional neuroimaging, including an Amyloid PET scan and
21

22 ³¹ Naira Goukasian et al., *Cognitive Correlates of Hippocampal Atrophy and*
23 *Ventricular Enlargement in Adults with or without Mild Cognitive Impairment*. 13
24 DEMENT. GERIATR. COGN. DIS. EXTRA. 281 (Aug. 2019).

25 ³² Peter T. Nelson et al., *Limbic-predominant age-related TDP-43*
26 *encephalopathy (LATE): consensus working group report*. BRAIN (June 2019) ("LATE
27 is among the common age-related diseases that can mimic the amnesic presentation of
28 Alzheimer's disease.")

³³ Willa D. Brenowitz et al., *Hippocampal sclerosis of aging is a key Alzheimer's*
disease mimic: clinical-pathologic correlations and comparisons with both Alzheimer's
disease and non-tauopathic frontotemporal lobar degeneration. 39 J. ALZHEIMERS DIS.
691 (2014).

1 genetic testing, Dr. Chui was able to rule out AD and opine that the most likely cause
2 of Girardi's dementia was hippocampal sclerosis or LATE.

3 Third, all neurologists had the benefit of Girardi's caregivers to offer accounts of
4 his daily functioning. In 2021, his daughter described Girardi's decline. Although she
5 had been estranged from her father for more than a decade, she saw his significant
6 decline in memory and ability to do even the most basic daily activities. In 2023,
7 Girardi's care manager at [REDACTED] noted her observations of Girardi's further decline,
8 including his inability to adequately clean himself after defecating. Her account is
9 corroborated by [REDACTED] chronological notes documenting Girardi's limited
10 functioning and lack of awareness, including his persistent belief he is running his
11 defunct law firm from his secured memory ward.

12 Fourth, although each neurologist obtained a medical history from Girardi, few
13 gave weight to Girardi's own assessment of his cognitive state. Rather than exaggerate
14 his memory impairment, Girardi downplayed his cognitive decline, insisting he was
15 "better than ever." Even when confronted with the neurological findings, Girardi
16 denied having any impairment. Far from "partially malingering"—i.e., exaggerating his
17 symptoms, Girardi was unaware of his impairment because of his lack of insight or
18 attempting to mask his obvious dementia.

19 Finally, even the Government's own neuropsychologist, Dr. Diana Goldstein,
20 conceded that Girardi suffered from Mild Cognitive Impairment, saying that back in
21 2020, "I do think it likely that Girardi met the diagnostic criteria for a Mild Cognitive
22 Disorder (specifically, Mild Cognitive Impairment)" (ECF No. 64, at 69).³⁴ Her
23 conclusion is based on records from late 2020—nearly three years ago. *Id.*
24 Significantly, MCI is considered "the intermediate stage between the cognitive changes
25

26 ³⁴ The defense expert only recently received and is still reviewing the raw data
27 from the Government's neuropsychologist, Dr. Diana Goldstein. Moreover, the
28 defense has not received the anticipated report from the Government's neurologist,
Dr. Ryan Darby. Accordingly, the defense will wait to address their reports in its reply.

1 of normal aging and dementia. . . MCI is important because it constitutes a high-risk
 2 group for dementia.” Yonas E. Geda, *Mild Cognitive Impairment In Older Adults*. Curr
 3 Psychiatry Rep. 2012 Aug;14(4):320-7.

4 **III. AS DETERMINED BY MULTIPLE MENTAL HEALTH**
 5 **PROFESSIONALS, GIRARDI’S DEMENTIA PREVENTS HIM FROM**
 6 **RATIONALLY ASSISTING WITH HIS DEFENSE**

7 Three mental professionals independently confirm that Girardi has severe deficits
 8 in cognition that will prevent him with assisting counsel in his defense. Girardi has a
 9 rudimentary factual understanding of the proceedings and his case. But his dementia
 10 prevents him from forming a rational understanding and prevents him from properly
 11 assisting counsel in his defense. Because of his severe memory loss and executive
 12 functioning decline, Girardi cannot rationally evaluate his case, assist counsel in the
 13 investigation of his case and in the presentation of his defense.

14 Both defense experts who assessed Girardi’s competency relied upon
 15 neuropsychological testing, client examinations, and collateral witness interviews,
 16 including defense counsel and lay witnesses.

17 **A. Neuropsychological Testing Provided Objective Measures of**
 18 **Girardi’s Poor Episodic Memory and Executive Functioning**

19 In light of Girardi’s significant hippocampal and temporal lobe atrophy, one
 20 would expect significant impairment in episodic memory and executive functioning.
 21 Neuropsychologist testing from Dr. Wood and Dr. Budding bear this out.

22 Dr. Wood conducted extensive testing of Girardi which confirm significant
 23 impairment in memory and executive functioning. Besides conducting substantive
 24 testing, Dr. Wood conducted performance validity testing to ensure Girardi was
 25 performing with sufficient effort.

1 [REDACTED]
2 [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED] As Dr. Wood's
11 explained, "Girardi's performance over time reflects a similar pattern of strengths and
12 weaknesses with mostly stable performances, although mild erosions were noted on the
13 WAIS-IV [IQ test]."

14 **B. Both Dr. Wood and the Neuropsychiatrist Dr. Lavid Relied Upon**
15 **Statements from Girardi's Counsel As Part of the Competency**
16 **Assessment**

17 Competency is ultimately a legal determination, not a medical one. It is critical
18 for mental health professionals to obtain information from all collateral sources. Most
19 important, experts rendering an opinion should interview defense counsel who is best
20 suited to assess the defendant's ability to assist them with the defense. *See United*
21 *States v. Duhon*, 104 F. Supp. 2d 663, 669 (W.D. La. 2000) ("one of the most evident
22
23

24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 issues is whether the assessing professional, usually a psychiatrist or a psychologist,
2 really knows what would normally go into the defense of the case”).

3 As part of their competency evaluations, both Drs. Wood and Lavid obtained
4 statements from Girardi’s defense attorneys. In 2021, Dr. Lavid obtained a detailed
5 statement from Girardi’s then-counsel Evan Jenness. In 2023, Dr. Wood interviewed
6 current counsel to provide their observations as to Girardi’s present ability to assist
7 counsel. As Dr. Wood noted, “his attorneys expressed that, despite attempting to prep
8 him and assist him by compensating for his memory deficits, they were unable to make
9 progress, because he was unable to recall previous conversations and his current
10 personal circumstances, including the st[REDACTED] of Girardi Keese, current resources, and
11 current allegations.”

12 **C. Dr. Wood Relied Upon Multiple Collateral Witnesses With**
13 **Firsthand Knowledge of Girardi’s Daily Functioning**

14 Besides counsel, Dr. Wood relied upon third party witnesses in the best position
15 to assess Girardi’s daily functioning over a lengthy period. Most prominently,
16 Dr. Wood obtained statements from Girardi’s long-term caregivers from 2021 until the
17 present, his housekeeper-turned-caregiver, Mancilla, and his [REDACTED] care manager,
18 [REDACTED] Mancilla recounted Girardi’s initial decline while [REDACTED] elucidated Girardi’s
19 further decline and status. Both accounts confirm Dr. Wood’s opinion.

20 **IV. DEFENSE COUNSEL AND LAY WITNESSES REINFORCE THE**
21 **EXPERTS’ FINDING OF INCOMPETENCE**

22 Multiple defense counsel spanning multiple years reach the same conclusion:
23 Girardi cannot assist in his defense. Both current and former counsel relied upon
24 numerous client interactions to conclude that Girardi is incapable of participating in his
25 own defense. Prior counsel, Evan Jenness, met with Girardi over a multi-year period.
26 Defense counsel have met with Girardi numerous times over lengthy meetings.

1 Despite differences in time and circumstances, a clear and consistent pattern of
2 Girardi's impairments emerges. First, despite in-depth and repetitive discussions,
3 Girardi cannot retain basic information about his case other than rudimentary facts such
4 as the number of complainants identified in the indictment. Second, despite explanation
5 and discussion of Girardi's present circumstances, Girardi cannot maintain awareness
6 of his status, including that he has been disbarred, that his firm is no longer in
7 existence, that clients continue to insist they have not been paid, and that he lacks the
8 present financial ability to pay such clients. And, occasionally, he cannot remember
9 that he's been charged with a crime. Even when Girardi has prepared notes during the
10 course of the meeting, he has no ability to recall what was discussed.

11 No amount of repetition or reinforcement can serve as a substitute for basic
12 retention of case information. Even if it was theoretically possible for defense counsel
13 to engage Girardi around the clock, insufficient information would be retained the
14 following meeting. While it is impractical for any defense counsel to repeat the
15 identical information at each client meeting, it is impossible to do so in Girardi's case,
16 where he is accused of a highly complex scheme involving multiple individuals over
17 multiple years.

18 In sum, Girardi is not competent to rationally assist in his defense. His profound
19 memory loss and executive functioning impairment, caused by his dementia, precludes
20 him from retaining critical information and using that information to determine the
21 direction of his case or participate in his ultimate trial. The overwhelming evidence
22 from multiple sources—expert witnesses, medical professionals, lay witnesses and
23 defense counsel—confirms that Girardi cannot be forced to proceed. Because the
24 Government will not be able to meet its ultimate burden, the defense respectfully
25 requests that, following a full hearing, the Court enter an order of incompetency.

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27 //

1 **V. GIRARDI IS ENTITLED TO A FULL AND FAIR HEARING WHERE**
2 **THE GOVERNMENT MUST ESTABLISH HIS COMPETENCY TO**
3 **STAND TRIAL.**

4 As discussed above, the Government bears the burden of proving Girardi's
5 competency, rather than defense proving his incompetence. If the Government contests
6 the findings of the experts presented, as expected, the defense has the right to call the
7 witnesses necessary to establish Girardi is incompetent to proceed. This may require
8 the defense to present, besides the expert witnesses and lay witnesses mentioned, other
9 medical professionals and lay witnesses who have observed his cognitive dysfunction
10 first-hand over-time and whose observations support various experts' opinions.

11 Whether and how the government contests the findings of the defense experts and other
12 witnesses will largely dictate the number of witnesses called to testify.³⁷

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28 ³⁷ As discussed above, the defense has not seen Dr. Darby's report and does not
know what opinion, if any, he has reached regarding Girardi's dementia.

1 **CONCLUSION**

2 For the foregoing reasons, the defense respectfully requests the Court conduct a
3 full competency hearing under 18 U.S.C. 4247(d). The burden is on the prosecution to
4 prove Girardi is competent to stand trial. Evidence presented will establish that Girardi
5 is not presently competent to stand trial because he cannot properly assist in defense of
6 his case. It will also establish that his condition is progressive-it will not improve and
7 will only decline and any attempt to commit him for restoration would be futile.

8 Respectfully submitted,

9 CUAUHTEMOC ORTEGA
Federal Public Defender

10 DATED: July 5, 2023

11 By /s/ Craig A. Harbaugh

12 CRAIG A. HARBAUGH
13 GEORGINA WAKEFIELD
14 J. ALEJANDRO BARRIENTOS
Deputy Federal Public Defenders
Attorneys for Thomas Vincent Girardi

PROOF OF SERVICE

I, **Christelle Solinap**, declare that I am a resident or employed in Los Angeles County, California; that my business address is the Office of the Federal Public Defender, 321 East 2nd Street, Los Angeles, California 90012-4202, Telephone No. (213) 894-2854; that I am over the age of eighteen years; that I am not a party to the action entitled above; that I am employed by the Federal Public Defender for the Central District of California, who is a member of the Bar of the State of California, and at whose direction I served a copy of the attached **EX PARTE APPLICATION FOR DETERMINATION OF COMPETENCY PURSUANT TO 18 U.S.C.**

4241(a) [UNDER SEAL] on the following individual(s) by:

☐ Placing
same in a sealed
envelope for
collection and
interoffice delivery
addressed as
follows:

☐ Placing
same in an
envelope for hand
delivery addressed
as follows:

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same in a sealed
envelope for
collection and
mailing via the
United States Post
Office addressed as
follows:

☐ Faxing
same via facsimile
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This proof of service is executed at Los Angeles, California, on **July 5, 2023**.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

/s/ Christelle Solinap
LEGAL ASSISTANT